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Attorneys for Plaintiff

ORACLE AMERICA, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ORACLE AMERICA, INC.

Plaintiff,

v.

GOOGLE INC.

Defendant.

Case No. CV 10-03561 WHA

**ORACLE'S RESPONSE TO COURT'S
NOTICE RE OPENING THE DOOR TO
ANDROID N**

Dept.: Courtroom 8, 19th Floor
Judge: Honorable William Alsup

1 Oracle submits this response to the Court's Notice Re Android N. ECF No. 1892.

2 Oracle has not and will not open the door to Android N. In the Court's Order on
3 GPL, OpenJDK, GNU Classpath, and Custom, the Court stated explicitly what would
4 and would not open the door (ECF No. 1829 at 3-4):

5 Oracle should take care, however, not to open the door. If Oracle suggests
6 to the jury that, as a technical or engineering matter, Google could not have
7 used OpenJDK for Android, then Oracle will open the door to the 2015
8 development. Oracle will, however, still be free to argue that OEMs and
9 carriers would have resisted it due to the very reason Google gave at the
time (OEMs having to contribute proprietary software back to the public).
Arguments like that will not open the door. And, Oracle can argue that "if
it was so viable, how come Google never did it back then when it
mattered?" This will not open the door to 2015.

10 Oracle has never once argued, or elicited testimony, that Google could not have used
11 OpenJDK as a technical or engineering matter.

12 On Friday morning, outside the presence of the jury, Google's counsel suggested
13 that certain Oracle statements highlighted in Google's willfulness brief (ECF No. 1884)
14 opened the door to Android N. Trial Tr. 935:2-14. In general, the statements Google
15 complains of relate to Google's continued release of new versions of Android even
16 though Google knew better. *See* ECF No. 1884 at 1-2. For example, Oracle's counsel in
17 opening remarks said: "And even worse than that, ladies and gentlemen, Google kept
18 coming out with new what they call flavors. New versions of Android, each time using
19 these APIs, even though they knew that they shouldn't be doing that. Gingerbread,
20 Honeycomb, Ice Cream Sandwich, Jelly Bean." Trial Tr. 277:1-5. Such statements do
21 not open the door to Android N. They do not state that Google had no technically
22 feasible alternative and was therefore forced to infringe with every new release. It is
23 undisputed that each of those versions (Gingerbread, Honeycomb, Ice Cream Sandwich,
24 Jelly Bean, and others) contains Oracle's copyrighted work. Indeed, the Court has
25 already so instructed the jury. Oracle's comment during opening is nothing more than a
26 simple statement that each of the versions of Android at issue contains Oracle's copy-
27 righted works and that Google continued to release new infringing versions of Android
28 even though Oracle had filed this suit and so Google knew that Oracle claimed that

1 Android infringed.

2 The only other type of statement Google complains of similarly relates to
 3 Android versions currently on the market. During the cross examination of Google's
 4 Eric Schmidt, Oracle's counsel asked: "Q: And did you take any steps, after this lawsuit
 5 got filed in August 2010, to take out of the mobile devices on the market any code or
 6 anything relating to those API packages? A: I'm not aware of any in that time period."
 7 See ECF No. 1884 at 2 (quoting Trial Tr. 394:15-18). But this too opens no door to
 8 Android N. This question and the answer focus on the time period immediately after this
 9 suit was filed in 2010, long before Google's 2015 Christmas Eve publication of non-final
 10 source code for a future release of Android N. Further, Oracle's question does not
 11 suggest that Google could not, as a technical or engineering matter, have used OpenJDK
 12 or any other non-infringing alternative. It simply inquires whether Google took any steps
 13 immediately following Oracle's commencement of this lawsuit to remove the infringing
 14 code from "devices *on the market*." Android N is completely beside the point and
 15 unrelated to the question and statements to which Google has previously pointed.

16 Finally, it bears noting that though Google has suggested that Oracle has opened
 17 the door to Android N, Trial Tr. 935:2-14, Google has not actually argued that the door is
 18 open and has not sought the Court's permission to introduce evidence about Android N.
 19 Rather, the Court had to issue the instant order, on the eve of Google resting, asking
 20 Google to speak now about Android N or to forever hold its peace. Google's failure to
 21 affirmatively move for permission to introduce evidence about Android N—especially
 22 given the significance Google placed on Android N this winter—is telling, to say the
 23 least.

24 Dated: May 15, 2016

Respectfully submitted,

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By: /s/ Andrew Silverman

Andrew Silverman

Counsel for ORACLE AMERICA, INC.